Supreme Court, U.S.
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No. 90-1121

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOAN GODLOVE,

Petitioner,

vs.

BAMBERGER, FOREMAN, OSWALD, and HAHN, a general partnership, and ROBERT H. HAHN, FRED S. WHITE, ROBERT T. BODKIN, WILLIAM P. FOREMAN, CHARLES E. OSWALD, JR., JOHN R. BURKE, JR., JEFFREY R. KINNEY, GEORGE A. PORCH, ROBERT M. BECKER, and GEORGE MONTGOMERY, individually and as partners of the law firm of Bamberger, Foreman, Oswald and Hahn,

Respondents.

CORRECTED PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pro Se Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of protected property rights in violation of the Due Process Clause of the Fifth Amendment:

(a) When the district judge who had been designated for service in another district after each of the judges sitting in the Southern District of Indiana recused himself or herself sua sponte entered an order under Rule 37(b)(2) dismissing petitioner's action with prejudice, without affording her an opportunity for a hearing on the record.

(b) Where petitioner's behavior would not support the Hammond Packing presumption.

(c) Where the sanction imposed was not specifically related to the particular "claims" which were at issue in the underlying discovery order.

(d) Where the Court of Appeals concluded, as a matter of law, that the sanction "took with it Counts II and V whether they had been properly dismissed previously under 12(b)(6) or not."

2. Whether a district judge's sua sponte recusal is subject to appellate review under 28 U.S.C. §§ 1291, 1292(b) or 1651.

3. Whether the waiver provision set forth in 28 U.S.C. § 455(e) signals Congress' intent to bestow upon litigants in federal court a statutory right to have a judge who might otherwise be disqualified

under 28 U.S.C. § 455(a) continue to sit in a case by means of a "remittal of disqualification" procedure upon agreement of the parties and their attorneys.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 903 F.2d 1145.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit affirming the district court's order dismissing petitioner's entire cause of action under Rule 37(b)(2) was entered on June 6, 1990. An order extending the time for filing a petition for rehearing to July 5, 1990 was entered by the Court of Appeals on June 20, 1990. On August 9, 1990, that court denied petitioner's timely-filed corrected petition for rehearing.

An order extending the time for filing a petition for writ of certiorari to and including January 7, 1991, was entered by Associate Justice John Paul Stevens on November 1, 1990. The statutory provision believed to confer on this Court jurisdic-

tion to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES

> No person shall . . . be deprived of . . . property, without due process of law.

U.S. Const. amend. V.

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> >
> > . . .
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 455.

It shall be the duty of an attorney:

. . .

Fifth. To maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets of his client.

Ind. Code § 34-1-60-4.

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2).

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing any criminal act; or
> >
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Ind. R. Prof. Conduct 1.6.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332, as well as 28 U.S.C. § 1331, because of diversity of citizenship, plaintiff being a citizen of Oklahoma and defendants, citizens of Indiana.

Multiple claims are asserted against an Indiana law firm and its partners in this

case by one of its former associates. Of the claims asserted in the original complaint, only one arose under federal law. The remainder were Indiana claims, a number of which presented issues of first impression. Among them were claims for retaliatory discharge,[1] breach of contract, interference with contractual relations, interference with a prospec-

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[1] The gist of the allegations forming the basis for the retaliatory discharge claims are that the Bamberger firm discharged petitioner in retaliation (1) for refusing to violate disciplinary rules to which she was subject as a lawyer admitted to practice in Indiana and Minnesota; for raising ethical issues; for questioning the conduct of lawyers, both in the Bamberger firm and out, which appeared to contravene provisions of the Code of Professional Responsibility; for resisting unethical conduct; and for reporting unprivileged knowledge of a lawyer's violation of a disciplinary rule to the appropriate authorities and (2) for filing a sex discrimination charge against the Mayo Clinic on behalf of herself and similarly situated professionals.

tively advantageous business relationship and two statutory claims.[2]

Four weeks after petitioner's complaint was filed, the Honorable Gene E. Brooks, Judge of the United States District Court for the Southern District of Indiana, requested the chief judge to transfer the case to another judge for the stated reason that "the Plaintiff, Joan Godlove, an attorney, (Cause No. EV 85-192-C) has appeared before me in court proceedings."

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[2] These claims relate to what the Bamberger firm did and failed to do following petitioner's discharge on July 1, 1983, namely its refusal to provide her with a letter setting forth the true reasons for her discharge after she had requested such a letter in the manner contemplated by the Indiana service letter statute, Ind. Code § 22-6-3-1, and its communicating by telephone six months later with one of petitioner's prospective employers, rather than responding to the Oklahoma firm's inquiry in the manner contemplated by the Indiana anti-blacklisting statute, Ind. Code § 22-5-3-1, with a written statement of the true reasons for the discharge.

No formal order of recusal, however, is to be found in the record.

Ten days later, the Clerk's office informed petitioner and respondents' counsel that the case had been reassigned to Judge S. Hugh Dillin, pursuant to Local Rule A-8, which provides that "[w]henever it becomes necessary to reassign any case, the chief judge shall refer the case to the clerk for reassignment."

During the following weeks, Judge Dillin and every other judge then sitting in the United States District Court for the Southern District of Indiana recused himself or herself[3] sua sponte without disclosing on the record the statutory

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[3] Other jurists opting out of this case were Judge William E. Steckler, Judge Sara Evans Barker, and Chief Judge James E. Noland.

grounds or factual basis for his action.[4]

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[4] On January 14, 1988, Plaintiff's Request that Judges of Southern District of Indiana Enter Orders Setting Forth the Statutory Ground(s) and Factual Basis for Their Disqualification and Reasons for Assignment of this Case to a District Court Which Did Not Have Ready Access to Indiana Law was filed. Among the reasons advanced for granting this request were that in ruling on a motion to dismiss certain claims presented in the amended complaint, Judge Beatty acknowledged that he was "hampered somewhat in [his] examination of Indiana law," Order (Feb. 12, 1986), at 4; that 28 U.S.C. § 455 and cases construing that statute indicated that a district judge is obligated not to recuse himself without reason just as he is obligated to recuse himself when there is a reason; and that unless the requested orders were entered, neither the former Chief Judge of the District Court nor the Seventh Circuit would be able to determine whether recusal was proper in each instance or whether assignment of this case to a district judge sitting in Illinois, rather than one sitting in the Northern District of Indiana might result in substantial prejudice to petitioner.

After noting that reporters containing Indiana decisions were, if needed, "approximately thirty minutes" away, the court adopted the argument advanced by defense counsel, i.e., that there is no authority for filing such a request; denied petitioner's request; and observed

On September 25, 1985, three months after the case had been filed, the Clerk noted for the record that the Honorable William L. Beatty, Judge of the United States District Court for the Southern District of Illinois, had been designated by Chief Circuit Judge Walter J. Cummings "for service in another district." By letter dated October 4, 1985, Judge Beatty notified the parties that the case had been assigned to him. In closing, the

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that it "would be highly inappropriate for this court to question their reasons for their recusal . . . ." Order (Feb. 16, 1988). App. 47. Petitioner's efforts to obtain appellate review of this decision were unavailing. App. 38-39; App. 50-51.

In light of the holding in United States v. Balistrieri, 779 F.2d 1191, 1205 n.14 (7th Cir. 1985), that the Seventh Circuit has "no jurisdiction to review a judge's order recusing himself unless the recusal would deprive the litigants of any opportunity to have their case heard at all," petitioner did not re-urge the recusal issue on appeal from the trial court's final judgment.

Illinois jurist remarked: "I would hope that it will not be necessary for us to gather in Evansville until the time of the trial and that motions or other arguments can be taken care of either by briefs or by telephone conferences."

In the course of fulfilling the duties assigned to him by Judge Cummings, the Illinois jurist made three separate trips to Indiana between October 4, 1985 and March 31, 1989: in December 1985, Judge Beatty traveled to Evansville, Indiana to hear arguments on Rule 12(b)(6), (e), and (f)[5] motions directed to petitioner's

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[5] Respondents urged the court to strike certain paragraphs of the original complaint on the ground that they contained scandalous matter, e.g., paragraphs alleging disciplinary rule violations. Rather than supporting their motion with affidavits countering those allegations, respondents asserted that because the alleged violations had never been the subject of a complaint filed with the Indiana Disciplinary Commission, the allegations are "subjective, speculative, utterly without foundation

original complaint; in December 1986, he traveled to Indianapolis to hear arguments on petitioner's motion to compel discovery and renewed Rule 12(b)(6) and (f) motions directed to the amended complaint; and on March 31, 1989 he returned to Indianapolis to conduct a pretrial conference, establish certain deadlines and discuss a fall 1989 trial setting.

At the March 1989 pretrial conference, Judge Beatty chose not to decide the Rule 37(b) (2) motion which the Bamberger firm filed in December 1987 after petitioner

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and merely serve to embarrass, humiliate and/or injure the reputation of members of the Indiana Bar in good standing..."

Although the trial court never ruled on this motion, it characterized Count I of the original complaint as containing "much material bordering on being scandalous." Order (Feb. 12, 1986) at 8. This "finding" is referred to by the Seventh Circuit in the third paragraph of its June 6, 1990 opinion.

failed to produce documents[6] described as

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[6] Requests No. 8, 9 and 10 were objected to by petitioner on her own behalf on the ground, among others, that the documents sought contained information encompassed by the work-product doctrine. Production of the documents sought by Request No. 2 and 9 was objected to on behalf of clients of the Bamberger firm on that and other grounds, including the attorney-client privilege, the statutory duty imposed on petitioner by Indiana Code § 34-1-60-4 "[t]o maintain inviolate the confidence, and, at every peril to [her]self, to preserve the secrets of [her] clients," and the parallel provision of Disciplinary Rule 4-101(B), which prohibited her from revealing "confidences" or "secrets" of her former clients, including those contained in the requested daybooks, to third parties, such as defense counsel, without the express consent of the clients in question. Petitioner did, however, offer to produce relevant entries in the daybooks if the firm demonstrated that she was no longer bound, under the applicable disciplinary rule, to treat those entries as "confidential information."

On November 11, 1987, after the court overruled these objections, petitioner filed a written request that the Bamberger firm notify clients she had represented of the pendency of the action and her assertion of the attorney-client privilege and work-product doctrine on their behalf. After the firm voiced its opposition, this request was denied by

follows in its Rule 34 request:

> Any lawyer's daybooks, diaries or calendars provided to Plaintiff by the Bamberger, Foreman, Oswald and Hahn (the "Bamberger Firm") or used by Plaintiff during her employment by the Bamberger Firm. [Request No. 2]
>
> All records, memoranda, notations, statements, summaries and all other documents relating to the matters in controversy which Plaintiff obtained from or as a result of interviewing any person purporting to have knowledge of the matters in controversy. [Request No. 8]
>
> Any notes or summaries of any kind made by Plaintiff at any time regarding meetings, conversations or communications of any kind to, from or with any Defendant. [Request No. 9]
>
> Any notes, summaries, comments or writings of any kind prepared at any time by Plaintiff regarding events or experiences, occurring during her tenure with the Bamberger Firm or any events or experiences in any way connected with or related to the Bamberger Firm. [Request No. 10]

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the court. This request was renewed at the time petitioner sought appellate review of the discovery orders upon which the Bamberger firm's Rule 37(b)(2) motion was based. See fn. 7, infra.

Instead, he held that motion in abeyance, noting that it would be ruled on "at the conclusion of the case," and said that he "[thought] it would be appropriate for [the Bamberger firm] to file some further motion, either to bar use of any documents or something along that line." Transcript of Proceedings 18:16-22; 39:2-13; 40:3-6 (Mar. 31, 1989).

On March 31, 1989, defense counsel represented to the court that he was ready to go to trial in September or October. Although he stated that he "would like to get the documents," no mention was made of his being unable to prepare for trial without them. Id. 39:22 - 40:2; 52:13 - 53:3; 54:23 - 55:2.

During the pretrial conference, when the subjects of petitioner's having raised a "work product" objection during her January 1988 deposition upon being questioned

about documents covered by Requests No. 9 and 10 and the magistrate's having stated that both sides should brief the issue before he ruled on the objection[7] came up, respondents' counsel informed the district court that he had not pursued the matter any further at the deposition and that he had "no intention of pursuing it further." Transcript of Proceedings 15:2 - 17:3;

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[7] Fourteen months earlier, when petitioner filed a motion seeking an extension of time to file a brief addressed to the "work product" issue raised during her deposition and in discovery orders entered by the court on September 28, 1987 and January 14, 1988, defense counsel led the court to believe that the magistrate had ruled on all objections raised during her deposition. Relying on this representation, the court denied petitioner's motion. Order (Feb. 25, 1988). This ruling prompted petitioner to file motions to stay enforcement of the district court's production orders and to seek appellate review of the rulings rejecting her work product and attorney-client privilege claims. The Seventh Circuit dismissed the appeal for lack of jurisdiction and declined to exercise its jurisdiction under the All Writs Act, 28 U.S.C. § 1651. App. 34-35.

17:10-18:11 (Mar. 31, 1989).

Two weeks later, with the prospect of having to respond to additional discovery requests and a fall trial fast approaching, respondents filed a Rule 37(b)(2) motion seeking dismissal of the remaining counts of the amended complaint, rather than an order precluding petitioner from offering the unproduced documents in evidence at trial. No attempt was made in the briefs filed in support of the law firm's motion to explain how nonproduction of these documents could have any impact on the correct decision of the remaining claims.[8] Rather, respondents raised the

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[8] For example, the Bamberger firm did not suggest to the court how "notes or summaries made by plaintiff regarding meetings, conversations or communications from any defendant" could have any material relevance to the Title VII claims, the equal pay claim or the two state law claims arising from the long distance telephone conversation between one of its partners and an Oklahoma attorney six months after the discharge.

possibility that production of the documents in question might aid them in their trial preparation:

> [T]he documents sought are of established relevance to the subject matter of this litigation and may be of great importance to Defendants in the preparation and presentation of their case.

Brief in Support of Second Application for Rule 37 Relief at 4.

On July 7, 1989, Judge Beatty, sitting in Alton, Illinois, granted the law firm's Rule 37(b)(2) motion and entered an order dismissing petitioner's entire cause of action.[9] App. 32-33. Petitioner's re-

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Nor did the firm counter the assertion made in petitioner's initial Rule 34 response that it had the substantial equivalent of the information sought via Request No. 2 in its possession in the form of billing statements.

[9] Of the claims asserted in the amended complaint, only five remained for disposition in the district court on July 7, 1989, when Judge Beatty decided to dismiss petitioner's action as a discovery sanction, i.e., the equal pay claim, two Title VII claims, and the two

quest for a hearing on that motion went unheeded. App. 90. So too did observations, made by petitioner during the pretrial conference and again in her brief in answer to respondents' Rule 37(b)(2) motion, that she had never been afforded an opportunity for a hearing on the record on the "work-product issues" raised in December 1987 and January 1988.[10] App. 70-

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claims arising out of the January 1984 telephone conversation between her former employer and a prospective employer. The other claims had been dismissed with prejudice on December 31, 1986.

Petitioner had filed motions requesting the district court to certify the dismissed claims for interlocutory appeal under Rule 54(b) and 28 U.S.C. § 1292(b). At respondents' urging, the district court adopted their proposed findings and denied both requests. Order (Feb. 25, 1988) ("[w]hile the legal theories in the counts that were dismissed may be different than those in the counts that were retained, all counts arise out of the same factual situation"); Order (Oct. 3, 1988).

[10] In commenting on the "work-product" issue raised during peti-

74; 90; Transcript of Proceedings 17:10-18:14 (Mar. 31, 1989).

Whether the district judge "heard" the petitioner at all, i.e., whether he reviewed her answer brief before deciding

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tioner's deposition, Magistrate Foster said:

> [I]n stormy seas one does not want to put a small boat, and I want to make sure, before I make that order, I don't want to induce, by my ruling, a waiver of that which a person's entitled to under this area.
>
> . . .
>
> [T]his issue, given the objection raised, should be briefed by both sides, given what you now know, and that there's no great rush at this point to have that answer today, and for that reason I'll allow the defendant to make further inquiry, either in the form of an interrogatory or in the continued deposition, whether it's in redirect or otherwise.

Partial Transcipt of Deposition of Joan Godlove 320:17-22; 322:3-11 (Jan. 22, 1988).

that "[t]he only sanction that would be meaningful in view of the entire history of this case is the extreme sanction of dismissal," is unclear. Errors contained in the sentences quoted below, which are the only direct references to the answer brief in the court's July 7, 1989 order suggest that the answer brief was seen through the eyes of a third person, e.g., a law clerk or respondents' counsel:

> On June 9, 1989, plaintiff filed her brief in response to defendant's second application for Rule 37 relief and on June 20, 1989, plaintiff filed a reply brief, with exhibits consisting of letters and other pleadings which plaintiff had filed in connection with the original request for production of documents and subsequent proceedings in relation thereto. In the conclusion of her brief she states: "Finally, the plaintiff renews the offer made in January, 1988 to provide the court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of this discovery order.

Order (July 7, 1989), p. 4, App. 24-25.

A cursory review of the plaintiff's answer brief will reveal that no exhibits were attached. App. 52-91. Instead, petitioner had endeavored to summarize facts relevant to the issues presented by the Bamberger firm's Rule 37(b)(2) motion in the opening section of her brief. App. 52-81. It is doubtful that the reference to "exhibits" is simply a typographical error, i.e., that the court meant to refer to "exhibits" attached to the defendants' reply brief. Only one exhibit is attached to that brief, a partial transcript of petitioner's January 1988 deposition, not "letters and other pleadings which plaintiff had filed in connection with the original request for production of documents and subsequent proceedings in relation thereto."

There are, however, two typographical errors in the district court's quotation

of the concluding sentence of petitioner's answer brief. The last three words in that sentence are "its discovery orders," not "this discovery order." App. 25, 90.

The court's interpretation of the final sentence of the answer brief appears to track the interpretation advanced by the Bamberger firm in its reply brief, i.e., that petitioner "claimed" that she had offered to produce all of the documents called for by Requests No. 2, 8, 9 and 10 for in camera review during her January, 1988 deposition, that that claim was false and that she was only offering to produce, for in camera review, notes related to her termination interview. App. 25, 32, 96-98. Once the final sentence in the answer brief is stripped of all reference to the deposition, it reads as follows: "the plaintiff offer[s] to provide the Court for its in camera inspection (or that of

Magistrate Foster) the documents which are the subject of its discovery orders."

In commenting further on the subject of in camera review, the court wrote, "Plaintiff finds fault with the court's order to produce certain material for in camera inspection by the court in order to determine her questions of privilege." App. 27. Perusal of the answer brief itself reveals that it contains nothing to support such a finding.

In its dismissal order, the district court stated that it had "considered the full record in this case in making a determination as to whether or not to impose sanctions and what sanctions to impose." App. 30-31. A comparison of what petitioner wrote the court on October 26, 1987, with what appears in the court's July 7, 1989 order raises questions which petitioner would have had an opportunity

to answer had there been the requested hearing on respondents' Rule 37(b)(2)(C) motion:

> Having done what I felt was required of me by the Code of Professional Responsibility (see Plaintiff's Brief in Response to Defendants' Motion to Compel Production of Documents, at p. 2; Plaintiff's Response to Defendants' First Request for Production of Documents, at pp. 2-4), and inasmuch as the attorney-client privilege belongs to the client alone, while the work product doctrine may be asserted by either the client or the attorney (see, e.g., In re Grand Jury, 106 F.R.D. 255 (D.N.J. 1985), I will not be submitting what you refer to on page 2 of your order of September 28, 1987 regarding the defendants Motion to Compel Production of Documents as "any claimed attorney client privilege material" to you for In Camera examination. . . .

Letter from Joan Godlove to Hon. William L. Beatty (Oct. 26, 1987). App. 62.

> In hindsight the court should probably have imposed sanctions on the plaintiff following her letter of October 26, 1987, when she stated: "I will not be submitting what you refer to on Page 2 of your order of September 28, 1987 regarding the defendants' motion to compel production of documents as 'any claimed

> attorney client privilege material' to you for in camera examination."

Order (July 7, 1989) at 5-6, App. 26-27.

In commenting on the district court's failure to conduct a hearing on the motion for sanctions, the Seventh Circuit wrote:

> Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse caused by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. Margolis [sic] v. Johnson, 587 F.2d 885, 888-89 (7th Cir. 1978). . . .

App. 14-15.

The order entered by the district judge does not indicate whether he had entertained the thought of making yet another trip to Indiana to conduct a hearing on the motion for sanctions. Nor does the order suggest that the Illinois jurist had decided that there "was nothing left for

him to do at a formal hearing except waste more time of the court and defendants." His final order does suggest that he harbored certain doubts about the underlying discovery orders: "It may be that the court's orders of September 28 and December 23, 1987, were in error as contended by plaintiff, but, if this court is to maintain any control over the litigation and have it proceed in an orderly fashion to a final conclusion, its orders must be obeyed until reversed." App. 28.

Before granting what the district court characterized as "the extreme sanction of dismissal," it did not address any of the constitutional arguments raised by petitioner in her answer brief. Whether this constitutes further evidence that the district court did not consider that brief or that it relied once more on representa-

tions made by respondents' counsel is an unanswered question.

Among representations which might have persuaded the court not to trouble itself with the answer brief are the following:

> Plaintiff's brief in answer to Defendants' second application for Rule 37 relief is largely a replay of arguments made previously. Defendants have already responded to these arguments and the arguments have been rejected by the Court.
>
> Consequently, Defendants see no need or useful purpose to be served by replowing that familiar ground and instead invite the Court's attention to the briefs Defendants have filed previously regarding this matter.
>
> Plaintiff does raise two points, however, that are new.
>
> First, she contends that her position is parallel to that of the petitioner in Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, Attorney General, Successor to the Alien Property Custodian, et al., 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958). . . .
>
> . . .
>
> Second, in her brief on this motion she claims that that [sic] at

> her deposition in January, 1988, she made an offer "...to provide the Court for its in camera inspection (or that of Magistrate Foster) the documents which are the subject of its discovery orders." . . .

Defendants' Reply to Plaintiff's Answer Brief on Defendants' Second Application for Rule 37 Relief at 1, 3-4. App. 92-93, 96-97.

The Bamberger firm's reply brief, like the district court's July 7, 1989 order, makes no mention of petitioner's "due process" arguments or the cases cited in support of those arguments. App. 92-99.

The reply brief does mention the "concern" which served as the basis for petitioner's failure to tender the documents in question to defense counsel:

> Plaintiff justifies her refusal to produce documents as ordered by the Court solely on her "concern" that complying with the Court's order would subject her to disciplinary proceedings in Indiana, where she no longer practices (except for this case). She makes no claim that by compliance with the Court's order

she would be subject to criminal prosecution.

To support her "concern" she offers nothing other than her own unique and peculiar understanding of Rule 1.6 of the Indiana Rules of Professional Conduct. Her "concern" is groundless; and to date, Plaintiff has not cited any authority in support of her interpretation of Rule 1.6.

Accepted principles in the law of privilege run directly counter to her position. The attorney-client privilege extends to agents and employees of an attorney. See Am.Jur. 2d, Witnesses, §§ 191, 217. Consequently, Defendants' counsel, as Defendants' agent, would not be a third party for purposes of disclosure.

The commentary of the rule also conflicts with Plaintiff's position. The commentary states: "The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client." (Disciplinary Rule 4.101 (B), cited by Plaintiff, has not been in effect in Indiana since January 1, 1987. I.C. 34-1-15-4, also cited by Plaintiff, does not exist.)

App. 94-95.

Petitioner had mistakenly referred to "Indiana Code § 34-1-15-4," rather than

"Indiana Code § 34-1-60-4" in the opening section of her answer brief, when she made the following observation:

> Production of the documents sought by Requests No. 2 and 9 was objected to by the plaintiff on behalf of clients of the Bamberger firm on that and other grounds, including the attorney-client privilege, the statutory duty imposed on plaintiff by Indiana Code § 34-1-15-4 "[t]o maintain inviolate the confidence, and, at every peril to [her]self, to preserve the secrets of [her] client[s]," and the parallel provision of Disciplinary Rule 4-101(B), which prohibited her from revealing "confidences" or "secrets" of her former clients, including those contained in the requested daybooks, to third parties, such as defendants' counsel, without the express consent of the clients in question.

App. 54.

Although respondents' counsel did not say as much, implicit in his representation that "I.C. 34-1-15-4, also cited by Plaintiff, does not exist," is a representation that no Indiana statute exists which requires attorneys "[t]o maintain inviolate the confidence, and, at every

peril to himself, to preserve the secrets of his client." Implicit in the law firm's statement that "Disciplinary Rule 4.101(B), cited by Plaintiff, has not been in effect in Indiana since January 1, 1987," is the suggestion that nothing (i.e., Rule 1.6 of the Indiana Rules of Professional Conduct) took its place.

In addition to quoting the language found in Rule 1.6, which is set out on page 4-5, supra, in her answer brief, petitioner also sought to direct the district court's attention to additional authority supporting her position:

> The following excerpt from the official comments to Rule 1.6 of the Rules of Professional Conduct regarding "authorized disclosure" should make it clear to Mr. Scism, his clients, and this Court that the disclosure of information protected by the attorney-client privilege to Mr.Scism or any other lawyer associated with the Barnes & Thornburg firm cannot be said to have been "impliedly authorized" by clients of the Bamberger firm who were repre-

sented by the plaintiff while she was an associate of that firm:

> Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

(Emphasis supplied).

Moreover, as is apparent from the plain language of Rule 1.6, disclosures that are "impliedly authorized" by a client are disclosures which are necessary "to carry out the representation [of the client]," not the representation of the firm in a controversy between the firm and one of its former associates.

From the above it follows that if the plaintiff revealed information relating to her representation of a client of the Bamberger firm to Mr. Scism or any other attorney in the Barnes & Thornburg firm without first having obtained the client's consent after consultation, she would be subject to disciplinary proceedings for violation of the express provisions of Rule 1.6 of the Rules of Professional Conduct.

App. 78-79.

The Seventh Circuit, like the district court, indicated that it too had examined

the entire record. App. 17. Its review led it to make the following findings and conclusions:

> [P]laintiff willfully and deliberately chose to ignore and refuse to obey the court's orders. . . . We see nothing but willfulness in this record. Plaintiff does not dispute her noncompliance was deliberate. Her excuse is only that she knew better than the district judge what response she should make. The district court concluded that after more than eighteen months of intransigence, resistance, and disregard of court orders that no other sanction could be meaningful. We see no factual findings by the district court which could reasonably be considered clearly erroneous. The facts justifying dismissal are vividly apparent on the face of the record.
>
> No matter the standard of review, in this case, even under the strict de novo standard of review, we could not but approve the imposition of the dismissal sanction. The district court could have abused its discretion only in declining to impose the dismissal sanction with prejudice to bring an end to plaintiff's attempt to manipulate the progress of her case to suit herself. . . .

(Citations omitted). App. 17-18.

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the Seventh Circuit's decision and prior decisions of this Court.

A. Petitioner was entitled to a hearing on the record.

In rejecting petitioner's argument that the district court should not have entered an order dismissing her entire cause of action without affording her an opportunity for a hearing on the record, the Court of Appeals for the Seventh Circuit wrote:

> Plaintiff had ample opportunity to respond to the court's orders, and her refusals were clear. No other hearing was needed to go over once again the discovery impasse cause by plaintiff. Whether to hold a hearing before imposing sanctions is a matter of the sound discretion of the trial court. There was nothing left for the court to do at a formal hearing except waste more time of the court and defendants. There was no abuse of discretion. . . .

App. 14-15.

To reach this conclusion required the panel charged with reviewing this case to ignore a long line of cases decided by

this Court, among them Hovey v. Elliot, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.Ct. 1087 (1958); Roadway Express, Inc. v. Piper, 447 U.S. 752, 65 L.Ed.2d 488, 100 S.Ct. 2455 (1980); and Logan v. Zimmerman Brush Company, 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982).

In Rogers, this Court clearly recognized that considerations of constitutional due process limit a court's authority to impose any discovery sanction. 357 U.S. at 209, 78 S.Ct. at 1094. To comply with the requirements of due process mandated by the Fifth Amendment, federal courts must provide fair notice and an opportunity for a hearing before imposing sanctions. See generally Roadway Express, Inc. v. Piper, supra, where this Court, after holding that attorney's fees

should not be assessed lightly or without fair notice and an opportunity for a hearing on the record, stated:

> The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.

752 U.S. at 767 n.14, 100 S.Ct. at 2464 n.14.

If there was ever any doubt that a cause of action is a species of property protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, it should have been dispelled by the Court's discussion of that subject in Logan v. Zimmerman Brush Company. In delivering the opinion of the Court, which concluded that the appellant was deprived of a protected property right in violation of the Due Process Clause of the Fourteenth Amendment, Justice Blackmun noted:

> The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants

> hoping to protect their property or as plaintiffs attempting to redress grievances. In Societe Internationale v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958), for example--where a plaintiff's claim had been dismissed for failure to comply with a trial court's order --the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Id., at 209, 78 S. Ct. at 1094. See also Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-351, 29 S.Ct. 370, 379-380, 58 L.Ed. 530 (1909) (power to enter default judgment); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (same); Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914 (1876) (same). Cf. Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

455 U.S. at 429, 102 S.Ct. at 1154.

This case stands in sharp contrast to Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978), the case the Seventh Circuit relied on in holding that Judge Beatty did not abuse his discretion in entering a Rule

37(b)(2)(C) dismissal without affording petitioner an opportunity for a hearing on the record. A review of the Margoles opinion reveals that the trial court heard oral arguments on defendants' Rule 37(b)(2)(C) motion and considered "affidavits, briefs and arguments of counsel" before making the following specific finding:

> that the failure to produce herein is willful, that it is prejudicial, that the matter sought to be produced is highly relevant and material to the case and it was and is within plaintiff's control, and that the failure to produce that and to comply with the procedural orders of the Court has been so prejudicial that the sanction [of dismissal] is appropriate.

587 F.2d at 886-87 (quoting oral ruling announced after oral argument).

What the Seventh Circuit may have had in mind when it cited Margoles in its opinion in this case is that portion of the Margoles opinion which pertains to the evidentiary hearing sought by plaintiff in

connection with his Rule 60(b) motion to set aside the earlier Rule 37 dismissal. On the subject of whether a second hearing was necessary, the Margoles panel wrote:

> Upon a full review of the record, however, we are constrained to agree with the district court that a hearing at which further oral argument and testimony were given was not required. The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order. Any further testimony would have been cumulative. We find no abuse of discretion in the district court's ruling that such a hearing was not appropriate.

587 F.2d at 889 (emphasis supplied).

B. Petitioner's behavior will not support the Hammond Packing presumption.

This Court's holding in Insurance Corporation of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099 (1982), was brought to the attention of the Court of Appeals by petitioner's counsel and cited for the proposition that the Due Process Clause places

at least two other limitations on a district court's power to impose discovery sanctions: "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707, 102 S.Ct. at 2107.

Although the panel concluded that the district court was "justified" in dismissing petitioner's entire cause of action as a discovery sanction, it did not make a specific finding that the sanction was "just," when measured by constitutional standards, or that the sanction was "specifically related to the claims at issue in the order to provide discovery," i.e., the claims which remained following the trial court's December 31, 1986 ruling on the law firm's Rule 12(b)(6) motion.

In commenting on these constitutional standards in Insurance Corporation of Ireland v. Compagnie des Bauxites, Justice White wrote:

> Rule 37(b)(2) contains two standards--one general and one specific--that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of Hammond Packing, supra, the former represents the general due process restrictions on the court's discretion.

456 U.S. at 708, 102 S.Ct. at 2107.

This Court took great pains in its decision in Insurance Corporation of Ireland to clarify standards to be used by trial courts asked to apply Rule 37(b)(2) to litigants appearing before them, as well as by appellate courts whose jurisdiction is invoked to assure that sanctions which are imposed by lower courts are not meted

out as a form of "punishment" for failure to obey particular discovery orders:

> Rule 37(b)(2)(A) itself embodies the standard established in Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), for the due process limits on such rules. There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." Id., at 350-351, 29 S.Ct. at 380.
>
> The situation in Hammond was specifically distinguished from that in Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of

> the defendant will not support the Hammond Packing presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See Societe Internationale v. Rogers, 357 U.S. 197, 209-213, 78 S.Ct. 1087, 1094-1096, 2 L.Ed.2d 1255 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see Part III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

456 U.S. at 705-06, 102 S.Ct. at 2105-06.

The behavior detailed in the record below will not, as a matter of law, support the Hammond Packing presumption with regard to the claims[11] before the district court on July 7, 1989.

As for the claims dismissed on December 31, 1986, pursuant to Rule 12(b)(6), they clearly were not the subject of discovery orders entered by the district court in 1987 or 1988 and, therefore, could not be

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[11] See footnotes 8 and 9, supra, and text accompanying footnote 8.

disposed of as a discovery sanction without violating petitioner's Due Process rights. Nonetheless, the Seventh Circuit held that the sanction order "took with it Counts II and V[12] whether they had been properly dismissed previously under 12(b)(6) or not." App. 5.

2. Exercise of the Court's power of supervision is warranted in this instance.

A. Failure to afford petitioner a hearing on the record.

The arguments set forth in the preceding section are adopted by reference in support of petitioner's contention that the exercise of this Court's supervisory

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[12] Counts II and V present claims which raise issues of first impression, among them, whether the Indiana Supreme Court would recognize (1) a wrongful termination claim where a lawyer alleged she was discharged for refusing to violate disciplinary rules or (2) a common law claim for damages proximately caused by a law firm's violation of the Indiana service letter statute, Ind. Code § 22-6-3-1. See footnotes 1 and 2, supra.

powers is warranted because the Court of Appeals sanctioned the district court's departure from the accepted and usual course of judicial proceedings.

B. Failure of the Seventh Circuit to supervise the administration of 28 U.S.C. § 455.

Although this Court denied a petition for mandamus to review the grant of a motion for disqualification due to bias and the appointment of new judge by the senior circuit judge in Ex parte American Steel Barrell Company, 230 U.S. 35, 45, 33 S.Ct. 1007 (1913), it noted in dictum that review was possible "in due course" if the action taken was unauthorized by law.

Because the Seventh Circuit declined to assume jurisdiction over the interlocutory appeal brought by petitioner in 1988 (and in light of its 1981 holding in United States v. Balistrieri, supra, that recusal decisions are not reviewable on appeal

from final decisions), petitioner was unable to secure any review whatsoever of the five sub silentio recusals in this case.[13]

As a consequence of the Seventh Circuit's decision not to review the serial recusals in this case after being urged to do so, district judges sitting in Indiana, Illinois, Wisconsin, and perhaps elsewhere may be more inclined to recuse themselves for statutorily impermissible reasons to avoid sitting on difficult or controversial cases. But see H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6355.

The Seventh Circuit's hands off policy will also serve to reinforce obiter dictum in Hampton v. City of Chicago, 643 F.2d

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[13] See footnotes 3 and 4, supra, and accompanying text.

478, 480 n.7 (7th Cir. 1981), that district judges are under no obligation to provide a statement of reasons for recusal. Compare Godlove v. Bamberger, Foreman, Oswald and Hahn, App. 10 (interlocutory appeal dismissed where "plaintiff sought to require all the district judges in Indiana who had disqualified themselves to give the reasons for their disqualifications") with In re United States, 666 F.2d 690, 695 (1st Cir. 1981) (although disqualification decisions "are in the first instance committed to the district judge," the test employed to determine if he abused his discretion is whether the decision can be "defended as a rational conclusion supported by a reasonable reading of the record").

The effect of the practice approved by the Seventh Circuit is and will be to deprive this Court, as well as the Seventh

Circuit, of any means of supervising the administration of 28 U.S.C. § 455(a) in that circuit in cases where a district judge, rather than a party invokes its provisions. Those who had a hand in drafting § 455, however, appear to have contemplated that recusal decisions would be subject to appellate review. See H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6355.

In Hampton, the Seventh Circuit noted in dictum that "[i]f it should even appear that unfounded recusals impede the administration of justice in the circuit, the circuit council would take appropriate action, but the interest being vindicated would be that of the public in the administration of justice, and not the interest of a particular litigant." 643 F.2d at 479.

The facts of this case suggest that particular litigants may, indeed, be prejudiced by unfounded recusals, e.g., the judge assigned to the case may not have access to controlling state law and, thus, may treat questions of law which is not only foreign, but also inaccessible to him as questions of fact and base his legal decisions on the testimony of experts, as was the case in Laubenheimer v. Factor, 61 F.2d 626 (7th Cir. 1932), or accept, without question, arguments presented by certain advocates appearing before him. The "designated judge" might also elect not to conduct hearings at a distant courthouse on motions he would ordinarily hear in his own court simply because of the impact travel would have on his caseload.

Most courts construing 28 U.S.C. § 455(e) view it as a defensive provision. See, e.g., United States v. Nobel, 696

F.2d 231, 236-37 (3d Cir. 1982) (for purposes of waiving disqualification of a judge under § 455(a) if impartiality might reasonably be questioned, it is sufficient if the judge provides full disclosure of his relationship at a time early enough to form the basis of a timely motion at or before trial and under circumstances which avoid any subtle coercion; the election to proceed after full disclosure of the relevant facts satisfies those requisites and constitutes an effective waiver under § 455(e)); SCA Services, Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977) (§ 455 is mandatory in requiring that judge disqualify himself in certain circumstances and, hence, may not be defeated by waiver and estoppel).

However, when § 455(e) is viewed in light of its legislative history, it becomes apparent that by its adoption,

Congress also intended to bestow upon litigants in federal courts a right to be heard on the issue of judicial disqualification under § 455(a). See H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) reprinted in U.S. Code Cong. & Admin. News, 1974, pp. 6351, 6357, where the following observations were made regarding the new waiver provisions:

> Subsection (e) of the amended statute prohibits a judge from accepting from the parties a waiver of his disqualification where it is based on any of the specific situations set forth in subsection (b) of the amended statute. However, where the basis of disqualification is because "his impartiality might reasonably be questioned" a waiver is permitted after a full disclosure on the record of the basis for disqualification.

(Emphasis supplied).

Reference to "'remittal of disqualification' upon the agreement of the parties and their attorneys" is found in various communications transmitted to the Commit-

tee on the Judiciary during its consideration of the proposed amendment, including a report from the Department of Justice and the Report of the Joint Committee on the Code of Judicial Conduct. Id. at pp. 6358, 6360, 6361. Although the procedures contemplated by the Joint Committee for accomplishing a remittal of disqualification are not described in the report itself, this Court, could most certainly establish clear and precise guidelines to be followed by litigants who elect to exercise their rights under subsection (e) after the necessary disclosure has been made on the record.

If, indeed, the waiver provision found in subsection (e), as it relates to disqualification for the "appearance of partiality" or "lack of impartiality," is to be of any real benefit to litigants and the judicial system as a whole, litigants

must be afforded an opportunity to use it and, thus, have a say in the matter. As the panel in In re National Union Fire Insurance Company, phrased it, "let counsel speak or keep silence as they will" after the judge has disclosed on the record the details he deems significant. 839 F.2d 1226, 1231 (7th Cir. 1988).

If the litigants are confident that a district judge, who might otherwise disqualify himself under subsection (a), is capable of proceeding impartially, what interest does the judicial system, the public or that judge have in seeing him step down?

As Judge Shadur noted not long ago, confidence in the impartiality of judicial proceedings "is as much sustained by conduct indicating a judge's ability to proceed impartially, notwithstanding casual prior acquaintance or knowledge, as

by withdrawal from cases in which his or her ability to make independent judgments is open to reasonable doubt. Any habit of too ready recusal would foster at best the impression of a timid judiciary and at worst cynicism about its fundamental capacity for impartiality. In either instance the result must be a diminution of public confidence in the courts." Clay v. Doherty, 608 F.Supp. 295, 299-300 (N.D. Ill. 1985).

CONCLUSION

For the reasons set forth above, petitioner submits that this Court should grant the writ sought herein and decide the issues presented by this case.

Respectfully submitted,

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